STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

On Appeal for the Court of Appeals
The Honorable Patrick M. Meter, The Honorable
Karen M. Fort Hood, and The Honorable Bill Schuette, presiding

THE GREATER BIBLE WAY TEMPLE OF JACKSON, a Michigan ecclesiastical corporation,

Plaintiff/Appellee,

v.

CITY OF JACKSON, JACKSON PLANNING COMMISSION, and JACKSON CITY COUNCIL

Defendants/Appellants.
_____/

Supreme Court No. 130196
Court of Appeal No. 255966
Lower Court No. 01-003614-AS

BRIEF OF APPELLANT CITY OF JACKSON

ORAL ARGUMENT REQUESTED

Respectfully submitted,

SECREST WARDLE
GERALD A. FISHER (P13462)
Consultant to the Firm
THOMAS R. SCHULTZ (P42111)
SHANNON K. OZGA (P59093)
Attorneys for City of Jackson
30903 Northwestern Highway
Farmington Hills, MI 4834
(248) 851-9500

OFFICES OF JACKSON CITY ATTORNEY
JULIUS A. GIGLIO (P32022)
Jackson City Attorney
SUSAN G. MURPHY (P49341)
Deputy City Attorney
Co-Counsel for City of Jackson
161 W. Michigan Avenue
Jackson, MI 49201
(517) 788-4050

Dated: July 10, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Court Rules

STATEMENT OF BASIS OF JURISDICTION

This Court granted Leave to Appeal to the City of Jackson by Order dated May 4, 2006, and ordered that this case be argued and submitted to the Court together with *The Greater Bible Way Temple of Jackson v City of Jackson* (Case No. 130194).

STATEMENT OF QUESTIONS INVOLVED

I. **Whether the trial court and Court of Appeals erred in finding that Plaintiff-Appellee, Greater Bible Way Temple of Jackson, did not waive its claim for attorney fees and costs by failing to formally request or amend its pleadings to request attorney fees and costs and whether the trial court and Court of Appeals erred in finding that Defendant-Appellant City of Jackson has not been substantially prejudiced by such failure.**

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
This Court should say "Yes."

INTRODUCTION

This case is a companion case to Case Number 130194 by way of order dated May 4, 2006, in which this Court granted leave in the present matter and ordered that this case be argued and submitted together with Case Number 130194. Defendant-Appellant, City of Jackson ("City") will rely on the procedural and factual history set forth in its brief in Case Number 130194 as though fully set forth herein. Further, for purposes of clarity and brevity, and in an effort to aide the Court in its review, the City has filed a single Appendix for both Case Number 130194 and this case. Where the Appendix is cited in the following brief, such citation refers to the Appendix also filed in Case No. 130194.

This appeal addresses the trial court's error in awarding Plaintiff Greater Bible Way Temple ("GBW") attorney fees and costs even though GBW failed to properly request such fees and costs. It has been the City's position throughout these proceedings that because GBW failed to amend its pleadings to request such fees and failed to otherwise timely request such fees, GBW waived any award of such fees.

STATEMENT OF FACTS

The City appeals the Court of Appeals' published decision affirming the award of attorney fees arising out of the companion appeal contained in docket number 130194. The pre-litigation facts are contained in the City's Brief in docket number 130194 filed in this matter, and are incorporated herein as if more fully set forth.

GBW filed a two-count complaint on July 12, 2001, including a "claim of appeal" from the City's denial of a zoning change (Count I) and a violation of the Religious Land Use and Institutionalized Persons Act[1] (RLUIPA) (Count II).[2] GBW sought injunctive relief from the trial

[1] 42 USC 2000cc, *et seq.*
[2] See Appellants' Appendix 13a-20a.

court to require the City to allow GBW to build an apartment complex in a single-family neighborhood.[3] GBW requested that the Court determine that the City acted arbitrarily and capriciously in denying GBW's rezoning request that the City violated RLUIPA when it denied GBW's rezoning request. Alternatively, GBW asked that the court remand the case to the City for a "proper" determination under Section 28-137 of the City's zoning ordinance as it pertains to planned unit residential developments. GBW's prayer for relief failed to include any language pleading damages, costs, or other equitable remedies deemed appropriate by the Court. Also absent from the GBW's pleadings was any reference to 42 USC 1988(b).[4]

Judge Alexander Perlos, now retired, determined that as to Count I of the complaint – the "traditional" constitutional challenge to the denial of the rezoning request – GBW had failed to sustain its burden of demonstrating that the City's zoning ordinance had denied GBW either substantial or procedural due process or equal protection of the law, or that it deprived GBW of its property without just compensation.[5] Judge Perlos held that unless GBW could show ". . . that the council acted arbitrarily or unreasonably, their determination is final and conclusive and no court may alter or modify the ordinance as adopted."[6]

Count II of GBW's complaint alleged a violation of RLUIPA, and was reassigned to Judge Chad Schmucker following Judge Perlos' retirement. The RLUIPA count was partially disposed of following hearing on competing motions for summary disposition. The City's motion for summary disposition was denied in total, but Judge Schmucker granted GBW's motion for summary disposition on two of the issues.[7] The remaining issues required a factual record to be made.

---

[3] *Id.*
[4] *Id.*
[5] Appellants' Appendix, 49a-51a .
[6] *Id.*
[7] These issues are discussed in the companion case in Docket number 130194.

Following the conclusion of a two-day trial conducted on July 14 and 15, 2003, the trial court, on its own, raised the issue of "attorney fees under RLUIPA."[8] In that regard, the court stated:

> I'm still not sure exactly what relief should be provided. I guess I'd like each of you to look into that, whether I enter a – enjoin the City for enforcing the zoning regulations. Whether – I don't know that I'm supposed to change it on my own, whether I remand it to them with an order to change it. There has to be a way to address the RLUIPA violation, I'm just not sure specifically what it is. I hope we don't spend a lot of time on this. I think there's – I'm not sure if you're making a claim for attorney fees under RLUIPA, but I hope we don't spend a lot of time on an unnecessary issue. Because I think it's clear that the Court has some authority to address a RLUIPA violation and, uh, to rectify it, I'm just not sure exactly the best way to do that.[9]

Following the court's prompting, GBW's counsel missed the cue and failed to amend its pleadings to include attorney fees and costs under the RLUIPA and §1988. GBW's counsel inquired of the court, "how the order should read?"[10] The court, in a clear and concise manner, stated, "Why don't you just prepare something and move for entry of it and we'll cross that bridge at that point."[11]

On July 18, 2003, GBW filed a seven-day notice of entry of order. When the proposed seven-day order was received on July 21, 2003, by the judicial clerk, she placed a stamp upon the order that read "7 Day Proposed Order not to be signed by the Judge until 7-30-03." The City received the proposed seven-day order on July 21, 2003, and immediately filed an objection to entry of proposed order on July 22, 2003.

The final order of July 29, 2003, prepared by GBW's counsel, was an abomination of the court's oral opinion of July 15, 2003, but more importantly, GBW ***still*** failed to include any provision in the order concerning "attorney fees and costs." The trial court, however, made a

[8] Appellants' Appendix, 812a..
[9] Appellants' Appendix, 812a..
[10] Appellants' Appendix, 813a.
[11] *Id.*

judicial determination regarding the proposed seven-day order, finding "After review of objections – reviewed and find ord. [order] accurate and complete and entering the proposed order."[12]

On July 31, 2003, the City filed an alternate proposed order and setting a hearing on that order for August 7, 2003, to coincide with GBW's already scheduled motion to settle order. The court, however, signed the proposed seven-day order on July 29, 2003. On August 7, 2003, the City appeared in court to proceed with arguments. GBW and its representative failed to appear. The court instructed the City to file a motion for reconsideration.[13] On August 8, 2003, the City filed its motion for relief from judgment of order dated July 29, 2003. On August 21, 2003, a hearing on the City's motion for relief from judgment was held, and the City argued that the final order dated July 29, 2003, was neither accurate nor did it comport with the court's oral opinion.[14] The court agreed, stating that the order ". . . is broader than I intended . . . so I am going to grant the uh, motion for relief from judgment." The court proceeded to gut the July 29, 2003 order by striking out entire paragraphs and rewriting other sections. Even at this hearing, GBW's counsel ***still*** did not seek to amend the complaint or the final order to include attorney fees and costs.

On August 26, 2003, GBW drafted another final order that was submitted under the seven-day rule. Again, GBW did not amend or incorporate attorney fees and costs in the final order. The court signed the Order on September 3, 2003.[15]

It was not until September 8, 2003, that GBW filed a motion for costs and attorney fees. On September 12, 2003, the City perfected its appeal of the revised final order dated September 3, 2003.

On October 29, 2003, GBW electronically telefaxed and mailed to the Jackson County circuit court clerk a hard copy of GBW's Response to Defendants' Answer to Plaintiff's Motion for Costs

[12] Appellants' Appendix, 817a.
[13] Appellants' Appendix, 826a.
[14] Appellants' Appendix 831a-840a.
[15] Appellants' Appendix 853a1-853a3.

and Attorney Fees. It included an "Exhibit One" attached only to the court's copy, which was a printout of the Hubbard Law Firm's bill. On October 30, 2003, GBW argued its motion for attorney fees and costs, claiming that it was entitled to attorney fees and costs on Count I. The court determined that it did not have authority to award attorney fees and costs on Count I and that the amounts should be backed out.[16]

As to Count II, the City argued that GBW waived its claim for attorney fees and costs because MCR 2.111(B)(2) requires the complaint to contain "a demand for judgment for the relief that the pleader seeks," and that failure to comply with the court rule is deemed a waiver.[17] The City also argued that Rule 9(g) of the Federal Rules of Civil Procedure (FRCP) requires that when an item of special damage is claimed, it must be specifically pleaded. Because attorney fees and costs are special damages, they must be specifically pleaded.

On October 30, 2003, before the court proceeding, the City's trial counsel reviewed the trial court file and found GBW's response brief together with Exhibit One, the Hubbard Law Firm's bill. At the hearing, the trial court stated that it had read the motion for costs, the City's response and GBW's response brief with the ex-parte Exhibit One.[18] Thereafter, it appears that the entire response brief and exhibit mysteriously disappeared without explanation from the court file. The City made a diligent effort to obtain a copy of the response brief and exhibit by oral and written requests, to no avail.

At the hearing, the trial court noted that it was troubled by the GBW's counsel's failure to plead attorney fees and costs or to amend the pleadings to include attorney fees and costs. In that regard, the court stated:

> Well the – I think the most trouble – I wish – I think the most troubling

[16] Appellants' Appendix, 877a.
[17] Appellants' Appendix 877a.
[18] Appellants' Appendix, 880a..

> issue is the fact that it wasn't clearly plead in the complaint, although the statute is not very complex and it's pretty clear from the statute that it's – that a prevailing party is entitled to attorney fees. I think it should have been pled.[19]

After hearing arguments of counsel, the court ordered GBW's counsel "to provide a copy of the bill to the City to go through it and challenge specific costs as related to Count I . . . [and] an opportunity to object."[20] On January 6, 2004, the City filed its objection to GBW's motion for costs and attorney fees.

On March 8, 2004, the City filed its motion to compel production of Exhibit One (the Hubbard Law Firm's Bill, which was submitted to the trial court only) and a Brief in Support of Dismissal with Prejudice for failure to provide the City with a copy, to determine if GBW had redacted costs and fees related to Count I. On March 9, 2004, the City filed its answer to the GBW's motion for costs and fees together with a brief in support of dismissal with prejudice for failing to provide a copy of the original Hubbard Law Firm bill and to redact the costs associated with Count I. On March 15, 2004, the City argued its motion to compel, and requested that the court dismiss with prejudice the GBW's motion for attorney fees and costs.[21] The City argued that the missing exhibit was necessary to properly object to the fees and costs requested. GBW simply responded:

> This Court never ordered me to provide a copy of that exhibit one to the Defendant. As the Court may recall, what it told me to do was, it denied me relief under Count I for my complaint, granted Count II and it said resubmit your bill to the City for them to review and I've done that and I've taken out everything related to Count I. And what's at issue is my latest bill. And if there's something in there that they don't like, then they can object to it and that's what's relevant.
>
> What I'm not asking to be paid for is irrelevant. And in that document contains very sensitive information. It talks about phone calls that I had with certain individuals and what they had to say and it's very proper for those bills to be submitted to the Court for the Court's eyes

[19] Appellants' Appendix 882a.
[20] *Id.*
[21] Appellants' Appendix, 893a.

> only for it to make a determination as to whether my bill is reasonable. And here, counsel is trying to get to my work product and one, that's one reason why he shouldn't have it, and two, it's just not relevant. I'm not asking to be paid for anything on that bill. I've redacted out what the Court said to redact out and if counsel thinks there's something on my new bill that is related to Count I or is accessible or irrelevant, that 's what's at issue right now.[22]

The trial court inquired of GBW's counsel whether he filed a copy of the bill with the court and had not provided the City's trial counsel with a copy, and counsel replied: "The exact exhibit of number one went just to the court for the court's eyes only."[23] The court went into an extended dialogue with the GBW's attorney that once the document is submitted, it should remain part of the court file. GBW's counsel disagreed with the court's statement and the court directed GBW counsel to furnish the court with a copy of the exhibit in a sealed envelope.[24] The court further admonished GBW's counsel that it was not the City's burden to show that it was entitled to see it, it was GBW's burden to show that the City is not entitled to see it, if GBW was claiming privilege. The City challenged the court's directive of sending the bill in a sealed envelope to the court by arguing that, if the original bill was for $31,000.00, and the revised bill was also for $31,000.00, then how could the City determine if GBW had redacted expenses associated with Count I of the complaint?

On May 10, 2004, the City filed its Supplemental Answer to Defendant's Objection for Costs and Attorney Fees. The City disputed GBW's revised bill because it failed to redact the Count I costs. As a matter of record, the City demonstrated that the revised bill was ***increased*** by $3,713.50 more than the original bill.[25]

[22] Appellants' Appendix, 897a-898a.
[23] Appellants' Appendix, 899a.
[24] Appellants' Appendix, 900a-901a.
[25] Appellants' Appendix, 919a.

The City objected to GBW's charges for the motions for discovery and the costs expended for GBW's counsel to properly prepare a correct final order.[26] The City also objected to the twenty-eight entries that had been shown on the original bill as "no charges to the client," but became billable expenses on the revised bill. The City argued that attorney fees and costs are reimbursable expenses to the client and not intended to be a method to enhance the attorney's personal income.

The court stated in its oral opinion, "I do believe that what was done on the zoning case needs to be backed out." The court further stated:

> Now, but I understand I can't – I'm not just approving a gross amount, I have to look at the individual charges. If something is in there that I think relates to the zoning case, its got to be backed out. If something obviously is in there twice or is too high or is inappropriate, I should back those out. That's why I want to – I'm gonna go through each of the issues raised by Mr. Stanowski and I'll address those.[27]

On May 19, 2004, the Court issued its opinion and order approving the bill in total, that is $29,780.50 in attorney fees and $1,234.36 in costs,[28] an increase of $3,713.50 from the original bill. The court opined that GBW had already removed charges related to Count I despite the fact that a review of the original bill and the revised bill indicated that each entry, item by item, is identical. Further, the court opined that the City's brief challenging the fees contained no citation to any cases or legal authority. Apparently, the court failed to consider cases cited in the City's answer and brief filed on October 6, 2003, and also failed to address MCR 2.111(B)(2) and FRCP 9(g). The court nonetheless further opined "the time spent and the charges are reasonable."[29]

The City filed an appeal with the Court of Appeals concerning the attorney fee issue in Docket number 255966 (companion case to COA Docket number 250863). The parties duly briefed

[26] Appellants' Appendix, 923a-924a.
[27] Appellants' Appendix, 927a-928a.
[28] Appellants' Appendix 931a-936a.
[29] *Id.*

the matter and the Court of Appeals heard both cases together and issued a single opinion.[30] With regard to the attorney fee issue, the Court of Appeals affirmed the trial court's decision, stating:

> Attorney fees may be awarded to the prevailing party in RLUIPA cases, in the court's discretion, under the authority of 42 USC 1988(b). Citing federal case law, defendants argue that plaintiff has waived its right to those fees because (1) plaintiff failed to list its claim for attorney fees and costs in its complaint and otherwise failed to file an amended complaint containing such a request and (2) plaintiff failed to incorporate its claim for attorney fees and costs into the various drafts of the final order.
>
> However, MCR 2.601(A) states: "Except as provided in subrule (B), every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." Therefore, the trial court properly exercised its discretion in awarding the fees. The issue of attorney fees was briefed by the parties, a hearing on the issue took place, and the trial court's written opinion awarding the fees shows that it thoroughly considered the matter. No error requiring reversal occurred.
>
> Defendants contend that the court should not have awarded attorney fees to plaintiff because the late presentment of the issue prejudiced defendants. In their statement of questions presented for appeal, defendants suggest that the court's award of attorney fees, under the circumstances of the case, essentially denied defendants due process of law. However, defendants offer no supporting authority for this argument. "A bald assertion without supporting authority precludes examination of [an] issue." *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). To the extent that defendants rely on *Van Pembrook v Zero Mfg Co*, 146 Mich App 87; 380 NW2d 60 (1985), to support their due process argument, we note that that case does not concern due process and attorney fees. Rather, *Van Pembrook* indicated that, because the plaintiff's complaint for breach of contract did not aver special damages, and because the damages did not flow naturally from the alleged breach, the complaint "did not reasonably inform defendant of these types of damages . . . " *Id.* at 107. Here, the award of attorney fees to the prevailing party was a possibility from the commencement of this RLUIPA lawsuit under the authority of 42 USC 1988(b). Thus, defendants knew or should have known of the possibility of such an award. Reversal is unwarranted.[31]

[30] Appellants' Appendix, 940a-947a.

The City filed separate applications for leave to appeal to this Court, which this Court granted on May 4, 2006.

LEGAL ARGUMENT

A. The trial court and Court of Appeals erred in finding that GBW did not waive its claim for attorney fees. Because GBW failed to amend its pleadings to request attorney fees and costs or otherwise address the issue before the Final Order being entered, GBW did, in fact, waive any award of attorney fees. The trial court and Court of Appeals decisions must be reversed.

The Court of Appeals, without any significant analysis and exclusively relying on MCR 2.601(A), determined that the trial court properly exercised its discretion in awarding GBW attorney fees in this matter. MCR 2.601(A) states: "Except as provided in subrule (B), every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings."

The proceedings in the trial court are extremely relevant for a proper analysis of this issue. A review of GBW's complaint filed in this matter shows that while GBW filed a claim under RLUIPA, GBW never specifically asked for attorney fees under the RLUIPA or under 42 USC 1988. During the two-day trial conducted on July 14 and July 15, 2003, the trial court indicated its confusion as to the relief requested by GBW. At that time, it appears that the court, on its own initiative, raised the issue of attorney fees and specifically stated, "I'm not sure if you're making a claim for attorney fees under RLUIPA." While GBW could have sought to amend its complaint to include a request for attorney fees under 42 USC 1988, it did not.

After the trial court ruled in favor of GBW on its RLUIPA claim following the trial, the parties argued over the wording of the final order. The transcript of the trial indicates that the court was basically at a loss for what should be the remedy in this case. The court directed the parties to

[31] Appellants' Appendix, 940a-947a.

submit an order that would include the remedy being granted. Several draft orders were submitted, but not one order addressed any award of attorney fees, either granting the fees or reserving the issue. If GBW was requesting attorney fees and costs as the prevailing party, it should have addressed such award in its proposed order.

The first "final order" was prepared by GBW's counsel and was entered on July 29, 2003; it and did not make any reference to attorney fees. After entry of this order, GBW did not file a motion for attorney fees. When the City's counsel appeared at the hearing on the motion to settle the order, GBW's counsel failed to appear. Thereafter, the court instructed the City's counsel to file a motion for reconsideration, and the City then filed its motion for relief from judgment, which the Court granted. At no time during these proceedings did GBW file a motion for attorney fees or raise the issue.

The trial court's second "final order" was entered on September 3, 2003. This order, while stating that GBW was a prevailing party, made absolutely no mention of an award of attorney fees. It was only after this final order was entered that GBW filed a Motion for Costs and Attorney Fees. In reviewing GBW's motion, the trial court seemed extremely troubled by the fact that GBW never pleaded attorney fees in the matter. Nonetheless, the trial court awarded such fees.

While MCR 2.601(A) provides that a final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if not demanded, in this case, the trial court's "final order" made no mention of an award of attorney fees. Even though the trial court had earlier mentioned the issue of attorney fees and questioned whether GBW was requesting attorney fees, GBW never requested an award of attorney fees until after the trial and after the trial court's "final order" was entered.

MCR 2.601(A) may be used by a trial court to grant certain relief that a party may be entitled to. Ordinarily, this "relief' is in the form of monetary damages where only injunctive relief is requested or an award of damages that are in excess of the amount requested by the plaintiff.[32] This court rule should not be used by the courts to allow a party to obtain an award of attorney fees, where such award is discretionary and the party was given every opportunity to amend its complaint or specifically request an award of attorney fees, but failed to do so.

This is not a case where the evidence adduced at trial demonstrated that the plaintiff was entitled to an award of damages greater than that originally requested. Nor is this a case where during the trial it was determined that injunctive relief in addition to damages was necessary to make the party whole. Instead, this is a case where the law was clear throughout the proceedings and the trial court gave GBW every opportunity to request attorney fees, but GBW failed to make a request for attorney fees before the "final order" was entered by the trial court. Under the circumstances, the trial court erred and abused its discretion in granting GBW attorney fees.

The Civil Rights Attorneys' Fee Act, 42 USC 1988, authorizes a district court to award a reasonable attorney fee to a prevailing party in a civil rights action, including litigation brought under RLUIPA. Section 1988 states:

> In any action or proceeding brought to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The act applies in state and federal courts.[33]

---

[32] See *Burnett v Mackworth G. Rees, Inc.*, 109 Mich App 547; 311 NW2d 417 (1981).
[33] See *Maine v Thiboutot*, 448 US 1, 10-11; 100 S Ct 2502; 65 L Ed 2d 555 (1980).

FRCP 9(g) provides for special damages in federal court actions. This court rule states that "when items of special damages are claimed, they shall be specifically stated." Attorney fees are ordinarily special damages that must be specifically pleaded.[34] In the present case, GBW did not specifically plead entitlement to attorney fees.

A waiver is a voluntary and intentional abandonment of a known right.[35] A claim or defense may be waived where a party fails to timely make said claim or defense. The question whether attorney fees have been waived by a party's failure to specifically plead them has been a source of debate. Many federal courts have held that a party may waive attorney fees if it does not specifically make a request for attorney fees in its pleadings,[36] while some other courts have held that FRCP 54(c) authorizes a fee award even if it was not specifically requested.[37] FRCP 54(c) provides that "except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." This court rule is similar to MCR 2.60 1(A), so the Court of Appeals' reference to that rule should not really have been dispositive.

Again, in the present case, the trial court's "final order" did not grant GBW an award of attorney fees. GBW had ample opportunity to request attorney fees before the "final order" was entered, but failed to do so. Because the trial court specifically raised the issue previously, GBW waived any award of attorney fees when it failed to amend its pleadings or specifically request attorney fees before the entry of the "final order."

Those cases that allow attorney fees even though such fees were not specifically pleaded are

[34] See *Western Casualty & Sur Co v Southwestern Bell Tel Co,* 396 F 2d 351, 356 (8th Cir 1968).
[35] See *Quality Products & Concepts v Nagel Precision, Inc.,* 469 Mich 362; 666 NW2d 251(2003).
[36] See *In re American Casualty Co,* 851 F2d 794, 802 (CA 6 1988); *Atlantic Purchasers, Inc v. Aircraft Sales,* Inc, 705 F2d 712, 716(CA 4),cert denied 464 US 848; 104 S Ct 155; 78 L Ed 2d 143(1983).
[37] See *Thorstenn v Barnard,* 883 F2d 217, 218 (CA 3, 1989); *Engel v Teleprompter Corp,* 732 F2d 1238, 1240 (CA 5, 1984).

based on an interpretation of FRCP 54(c) that "fees may be awarded where the parties to the action knew or should have known an attorneys' fee award could issue."[38] Section 1988, however, does not automatically grant a prevailing plaintiff an attorney fee award. Instead, an attorney fee award is discretionary. Section 1988 states that the court, in its discretion, may allow the prevailing party a reasonable attorney's fee. Further, § 1988 does not provide that a court may grant an attorney fee on its own initiative. A statute must be read as a whole, rendering every word some meaning, and the Legislature is presumed to have intended the meaning plainly expressed.[39] The word "shall" denotes mandatory, while the word "may" designates discretionary.[40]

While the City in the present matter might have been on notice that GBW was asserting a RLUIPA claim, the City was not on specific notice that GBW would be requesting attorney fees. Attorney fees are discretionary under RLUIPA, they are not mandatory; and attorney fees certainly are not required if never requested by the party. Section 1988 must be distinguished from a statute that requires an attorney fee award and the party specifically requests the award.

For example, in *Alcatel USA, Inc v Cisco Systems, Inc,* 239 F Supp 2d 660 (ED Tex, 2002), the plaintiff did not specifically plead a request for statutory damages, costs and attorneys' fees in any of its pleadings, but the court found that such awards are inherently permitted under the plain language of the Texas Theft Liability Act and the plaintiffs intent to seek such awards was expressly manifested in the parties' proposed joint final pretrial order. See *Id.* In this case, there was no manifestation that GBW would be requesting attorney fees. In fact, GBW's failure to raise the issue or address it after it was raised by the trial court gave the impression that GBW would not be requesting attorney fees.

---

[38] See *Atchison Casting Corp v DOFASCO, Inc.,* 1995 US Dist LEXIS 17367 (DC Kansas 1995), citing *Thorstenn, supra* at 218 (finding that the complaint clearly asserted statutory claims based on violation of a federal statute for which 42 USC 1983 provided a remedy, triggering attorneys' fees under sec. 1988).

[39] See *Bendion v Penobscot Management Co (On Remand),* 225 Mich App 235; 570 NW2d 473 (1997).

Section 1988 does not specifically allow a court to award attorney fees on its own initiative. In this case, GBW was required to specifically make a request for or plead attorney fees pursuant to the RLUIPA and § 1988. In the absence of such a request or pleading before the "final order" was entered, GBW waived such an award of attorney fees.

While GBW did request attorney fees in a post-judgment motion, the trial court should have found that request to be untimely under the circumstances. Again, the trial court previously raised the issue of whether there was a request for attorney fees, and GBW failed to amend its pleadings or specifically request attorney fees. GBW should have at that time made the request for attorney fees. The City's counsel interpreted GBW's failure to amend its pleadings or make a specific request for attorney fees as a waiver of GBW's request for attorney fees. The trial court was at a loss as to what remedy to grant and the court specifically directed GBW's counsel to prepare an order. The parties went through several draft final orders in this matter, during which time GBW never raised the issue of attorney fees. GBW made no mention of a request for attorney fees under RLUIPA until after the second "final order" was entered. Under the circumstances, it was disingenuous for GBW to make a late request for attorney fees and, thus, GBW waived the issue.

Under FRCP 9(g), a federal court would not have the power to grant attorney fees under §1988 where attorney fees were not specifically pleaded. So why should a state court have the power to grant such fees under that statute, by way of a court rule, even though the fees were essentially waived? The answer is that a state court should ***not*** have the power to grant relief under a federal statute if the federal court could not do so.

[40] See *Mollett v City of Taylor,* 197 Mich App 328; 494 NW2d 832 (1992).

B. The trial court abused its discretion in awarding GBW attorney fees in this matter. The late presentment of the issue severely prejudiced the City.

Even if the Court finds that the attorney fees in this case did not have to be specifically pleaded as required under FRCP 9(g), that should not change the end result in this matter – which is that GBW waived any award of attorney fees. GBW completely failed to request any costs or damages in its complaint or thereafter until after the "final order" was entered. GBW's failure to specifically request or even mention attorney fees at the time the court raised the issue and later in the proposed orders should bar it from untimely raising the issue after the court entered the "final order" in the matter.

The Court of Appeals determined that the City was not prejudiced by GBW's late presentment of the attorney fee issue, because the City knew or should have known of the possibility such an award. According to the Court of Appeals, the award of attorney fees to the prevailing party was a possibility from the commencement of the RLUIPA lawsuit under the authority of 42 USC 1988(b). Again, while the City was aware that the present action was brought, in part, under RLUIPA, an award of attorney fees is not mandatory and § 1988 does not specifically allow a trial court to award attorney fees on its own initiative.

In this case, the trial court raised the issue of attorney fees and GBW said and did nothing. When the trial court indicated its confusion regarding the requested relief, GBW did not state that it was requesting attorney fees if found to be a prevailing party. While the proposed orders were being submitted and challenged, GBW did not raise the attorney fee issue nor did it ask that the "final order" mention anything about an attorney fee award. When the first order was entered, GBW did not file a motion for attorney fees. Under the circumstances, GBW's total failure to address the attorney fee issue led the City to believe that attorney fees were not being requested because, again,

an attorney fee award is not required.

Accordingly, the trial court should have determined that GBW waived any award of attorney fees as prevailing party under RLUIPA. The trial court abused its discretion when it awarded GBW attorney fees under the circumstances of this case. The Court of Appeals gave this issue little thought in its opinion, and instead relied on MCR 2.601(A) to find that the trial court could grant any relief it felt appropriate. Under the circumstances of this case, MCR 2.601(A) is inapplicable. The Court of Appeals erred in exclusively relying on this court rule to affirm the trial court's award of attorney fees to GBW.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erred in relying on MCR 2.601(A) when it affirmed the trial court's award of attorney fees in this matter. Pursuant to FRCP 9(g), GBW was required to specifically request attorney fees in its pleadings. However, not only did GBW fail to request attorney fees in its pleadings, when directly approached with the issue by the trial court, GBW failed to amend its pleadings to request attorney fees or include attorney fees in any draft orders, the first order entered by the trial court or the "final order." Under the circumstances, the trial court abused its discretion in awarding GBW attorney fees. The circumstances of this case demonstrate that GBW is not entitled to attorney fees, but instead, waived any such award.

WHEREFORE, Defendant-Appellant, the City of Jackson, respectfully requests this Honorable Court reverse the Court of Appeals decision and the trial court's award of attorney fees in this matter.

Respectfully submitted,

SECREST WARDLE

BY: _____
GERALD A. FISHER (P13462)
Consultant to the Firm

BY: _____
THOMAS R. SCHULTZ (P42111)
SHANNON K. OZGA (P59093)

OFFICES OF JACKSON CITY ATTORNEY

BY: _____
SUSAN G. MURPHY (P49341)
Deputy City Attorney

Dated: July 10, 2006

837474_1.DOC